IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.2 OF 2002

1. Shri. Sadanand Yeshwant Hede,
(since deceased) represented by
his legal heirs

1-a Sanjeeva Sadanand Hede,
major, bachelor,
commercial employee

1-b Smita Sadanand Hede,
major, spinster,

1-c Rajeev alias Vishnu Sadanand Hede,
major, bachelor,

1-d Yogesh Sadanand Hede,
major, bachelor,

All residents of “Rama Smriti”
Cosmo Motels, Porvorim,
Bardez, Goa.

1-e Shri Suhas Kamat,
major, married.

1-f Smt. Nandita Suhas Kamat,
Both residents of Vasco-da-Gama,
Goa.

(Power of attorney given by
Appellants no.1b to 1f in favour
of 1a) ...Appellants/
(Org.defts./their
heirs)

V e r s u s

Shri. Mahadev Janardhan Hede
major, commercia employee,
married, resident of Shenvi
Vaddo, Shiroda,
Ponda, Taluka Goa. ...Respondent/
(Original Plaintiff)

Shri S. G. Desai, Senior Advocate with Shri Pednekar, Advocate for the appellants.

Shri J. Godinho with Shri T. D'Costa, Advocates for the respondent.

CORAM: N. A. BRITTO,J.

DATE : 14th October,2005.

JUDGMENT

This is defendants' second appeal arising from Reg.C.S. no.14/98/B.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the suit. The plaintiff having filed a suit for injunction simpliciter against the defendant – since deceased and now represented by his legal heirs, the same was decreed by the trial Court by judgment/decree dated 30.10.99. The defendants carried an appeal to the District Court , Panaji, and the same was dismissed by the learned Second Additional District Judge on 16.8.01.

3. This appeal was admitted on 13.6.02 on four substantial

questions of law but it has been agreed by the parties that only two questions need be answered by this Court, and they are:

1. Whether the Sale Deed dated 26.9.72, fundamental document having direct bearing on the result of the suit has been misconstrued?

2. Whether the Courts below have considered inadmissible evidence having direct bearing on the result of the suit or have ignored the relevant admissible evidence having direct bearing on the result of the suit?

4. The dispute between the plaintiff and the defendant is regarding a piece of land admeasuring about 80 sq.metres forming part of survey no.160/8 of village Shiroda and lying in between a footpath of about six metres width and a road. The plaintiff claims the same as part of his property purchased by him vide Sale Deed dated 26.9.72 – Exh.Pw.1/A from about 12 co-owners of the same including Suryaji Sinai Hede and his wife Mangalabai S. Hede. The defendant claims a right to the same by virtue of Sale Deed dated 20.1.88 – Exh.Dw.1/B colly having purchased the same from the said Suryaji and his wife Mangalabai.

5. There is no dispute that the property known as 'Goracodil' or 'Vitol Gude Babot' having land registration no.2783 was registered in matriz

/revenue records having two additions. The first addition has its western boundary a 'caminho' which means a road,a way, a drive, a street, a path, pathway, highway, etc. The eastern boundary of the second addition is also the said 'caminho' - a road, a way, etc. There is no dispute that the plaintiff by virtue of the Sale Deed dated 26.9.72 purchased the said first addition having matriz no.2005 situated on the west of the said road. The second addition is having matriz no.2006 and although both the parties generally agree that what the defendant purchased by Sale Deed dated 20.1.88 is the said second addition having matriz no.2006, the defendant has not clearly stated to be so in his written statement nor the Sale Deed dated 20.1.88 mentions that what was sold to the defendant by the said Suryaji and his wife Mangalabai was the portion comprising of the second addition having matriz no.2006. At times the defendant has stated that he has purchased part of matriz no.2006 only.

6. The learned trial Court had observed, and in my view rightly, that the property sold under Sale Deed dated 20.1.88 could not be sold by two co-owners when part of the property was sold to the plaintiff by 12 co-owners. The defendant filed an application before the First Appellate Court dated 12.6.01 to produce copy of the Inventory proceedings no.7/1940. However, the defendant did not make any categorical statement in the said application that the second addition was described under any particular verbal/item and was allotted to Suryaji Hede. Item No.24 does not refer to

second addition of property Goracodil.

7. There is no dispute that the road is shown as a road on the survey plan, which survey, as observed by the trial Court, was done in the year 1972 – 73. As far as the said footpath is concerned, the same has not been shown on the survey plan Exh.Pw.1/B but it is admitted that in its eastern direction it joins the said road and in western direction it runs through the property of both the parties surveyed under no.160/7 and 150/17. This footpath has been shown as a passage on the plan annexed to the defendant's Sale Deed dated 20.1.88 and not only that in a suit where both the parties filed consent terms, namely Spl. C.S. 7/93, part of it was shown by both the parties as a footpath kept in common for the use of the plaintiff and the defendants. The fact that the footpath was not reflected in the survey plan shows that the said passage/footpath was not very prominent. According to the defendant the said passage/footpath is the old road and which is the western boundary of the plaintiff's property as referred in matriz 2005 and Sale Deed of the plaintiff. If that is so, the defendant has failed to explain as to why the same was not referred to as an old road either in his Sale Deed or in the consent terms filed by both the parties or the plaintiff's Sale Deed wherein it is referred only as a road. According to the defendant, the road shown as a road was of recent origin constructed in the year 1970 or 1972. According to the plaintiff, the said

road has been in existence from the year 1945 and it was tarred somewhere in 1973. It is the submission made on behalf of the defendant that the matriz/revenue records were prepared in the year 1905 and if the road came into existence in the year 1945 or thereabout, it could not have been the road which is referred to in the matriz no.2005 and the Sale Deed of the plaintiff. As regards this submission, it must be stated that there is no whisper in the evidence led on behalf of both the parties that matriz record or certificate was prepared in the year 1905 or thereabout. In my view,the sellers of the plaintiff and the defendant were fully aware that their property was made of two additions having matriz nos.2005 and 2006 which were separated by a 'caminho' to which they referred to, in the Sale Deed of the plaintiff dated 26.9.72, as a road and that 'road' could be none other the road which was shown on the survey plan, prepared soon after the said Sale Deed. The said sellers did not refer to the said “caminho” as a way or passage or old mud road in the said Sale Deed. Therefore the defendant who has succeeded two of the said co-owners now cannot be heard to say that what was referred to was a way and not a road. The learned First Appellate Court has given a finding that the public tar road shown on the survey plan is the 'caminho' mentioned on the matriz certificate and the Sale Deed of the plaintiff. That is a finding of fact. It has been stated by the Apex Court in the case of **Corporation of City of Bangalore v. M. Papaiah and another (AIR 1989 S.C. 1809)** that interpretation of revenue

record is not a question of law and a finding of fact rendered by the lower Court on the basis of interpretation of revenue record cannot be interfered in a second appeal. The question (1) has got to be answered against the defendant.

8. The sale in favour of the plaintiff was prior to preparation of survey records. The plaintiff claimed that the first addition sold to him was surveyed under no.160/8. Although the survey was prepared in the year 1972 – 73, survey no.160/8 came to be recorded in the name of Rajaram Hede and Vinayak Hede, two of the sellers who were the parties to the Sale Deed in favour of the plaintiff. The First Appellate Court might not have been right in observing that since the survey records showed the name of the said Rajaram Hede and Vinayak Biku Hede and the plaintiff who had stepped into their shoes was to be held as a deemed occupant of the holding surveyed under no.160/8. However, the defendant had not examined either the said Suryaji or his wife in support of his title or possession conveyed to him and there is no dispute that the dispute between the plaintiff and the defendant started soon after the sale deed was executed by the said Suryaji and his wife in favour of the defendant. The defendant examined the attorney of the said co-owners which included the sellers of the defendant and who had sold the first addition in favour of the plaintiff. According to the defendant the partition was done as per survey numbers

i.e. survey no.160/8, 150/14, 150/15 and 150/16. As per the said attorney namely, Dw.2 Dinanath Hede the various co-owners had divided the entire property into four portions namely, survey nos.160/8, 150/14, 150/15 and 150/16 and it has been stated by Dw.2 Dinanath Hede, the said attorney that the second addition was divided into three portions belonging to said Suryaji Hede, himself and the sons of Biku Hede. He also stated that the second addition was surveyed under nos.150/14, 150/15 and 150/16. He also stated that the addition sold to the plaintiff lies in survey no.160/8. If the second addition is surveyed under nos.150/14, 150/15 and 150/16, it follows that 160/8 forms part of the first addition which was sold to the plaintiff and of which the plaintiff was in possession from the time the same was sold to him and subsequently surveyed separately. Again, if partition was done as per survey numbers, there is no reason to accept that only part of survey no.160/8 was sold to the plaintiff. The defendants did not produce any evidence to show that part of survey no.160/8 lying in between the said footpath and the road was being enjoyed by the said Suryaji and his wife or for that matter any other co-owners of the same. The plaintiff has been very consistent in his evidence whilst the defendant as well as his witness have been wavering. Both the Courts below have come to the conclusion that the plaintiff was in possession of the entire first addition sold to him and which was surveyed subsequently under survey no.160/8. Though question (3) is vaguely framed, the same also requires to

be answered against the defendant.

9. In view of the above, both the substantial questions framed have got to be answered against the defendants. Consequently the appeal fails and his hereby dismissed with costs to be paid by the defendant.

N. A. BRITTO,J

/vpf.